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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE UNITED STATES, APPELLANTS,
v.
WILLIAM EDMONSON. } No. 353.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

STATEMENT.

This is a claim which was successfully prosecuted against the United States in the court below for the sum of $200, alleged excess of charge over the legal price for a certain tract of public land situate in the State of Wisconsin and described in Finding I, under the allegation that whereas the land was legally purchasable under the preemption laws at single minimum price the claimant was charged double minimum price therefor. The land in question had been raised to double minimum price and put into the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, and hence at the date of

the entry of said land by the claimant under the provisions of the preemption law, to wit, on March 11, 1891, it is contended that the land fell within the provisions of section 3 of the act of June 15, 1880 (1 Supp. Rev. Stats., 298. See 23 Stat., 237, for the whole bill), which provides as follows:

> The price of lands now subject to entry which were raised to $2.50 per acre and put into the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to $1.25 per acre.

It is found by the court that—

> At the time said [cash]* entry was made and said money paid to the receiver at the local land office at Ashland, Wis., it does not appear that the claimant made any protest or objection to said payment nor asserted any right to purchase the land at a less price than that which he was called upon to pay for said land. (Finding IV, Record, p. 3.)

Subsequently, however, application was made by the claimant to the Department of the Interior for repayment of one-half of the purchase money upon the theory outlined above, which was duly considered by that office and on March 19, 1895, rejected upon the ground that this land was situated within the limits of a railroad grant and that it was not a case where the land was afterwards found not to be within the limits of a railroad grant, and was not a case which had been

* The word "cash" in this finding is a clerical error. The entry was made under the preemption law. (See Finding I.)

erroneously allowed and could not be confirmed within the meaning of those expressions as used in the act of June 16, 1880 (21 Stats., 287); and that inasmuch as there was no other authority in law for making such repayment said application must be denied. (See Finding VI, Record, p. 3, and case reported in 20 L. D., 216.)

In rendering judgment in favor of the claimant in this case the court below did not file any opinion, and we are therefore at a loss to know whether the court rested its judgment upon the provisions of the act of June 16, 1880, or upon its general jurisdiction, upon the theory that the facts raised an implied contract to pay back the money thus determined to have been erroneously charged. A very large number of cases of this sort are now pending in the Court of Claims, and it is essential that the issues of law here involved should be determined by the court of last resort, and although the case at bar is seemingly insignificant in amount, yet in view of the great importance of the questions presented, and of the great number of other cases pending before the court involving the same questions, counsel deem themselves justified in presenting the issues to the court fully and at some length.

ASSIGNMENT OF ERRORS.

The court below erred:

I.

In holding, if it did so hold, that the facts in the case at bar brought the same within the purview of the repayment provisions of the act of June 16, 1880.

II.

In holding, if it did so hold, that there was any implied contract on the part of the United States for the repayment of the money embraced in the judgment of the court below.

III.

In assuming jurisdiction over the cause of action set up in the claimant's petition.

IV.

In rendering judgment against the United States in the sum of $200, or any other sum whatsoever.

BRIEF OF ARGUMENT.

Inasmuch as the court below did not file any opinion in this case, we are left without certain knowledge of the ground upon which the judgment of the court below is made to rest. Manifestly, however, the judgment must rest upon the construction of the provisions of the act of June 16, 1880, or else upon the general jurisdiction of the court, founded upon the theory that the facts presented in the findings make out a case of implied contract within the meaning of that expression as used in the Tucker Act. It is necessary, therefore, to consider the judgment upon both grounds, and this brief will submit to the court these three propositions:

First. That the facts disclosed in the findings do not entitle the claimant to relief under the provisions of the act of June 16, 1880.

Second. That the facts disclosed in the findings are not sufficient to create an implied contract on the part

of the United States for the repayment of the sum for which judgment was rendered.

Third. That the payment here made, conceding it to have been greater than the lawful price of land, was in all respects a voluntary payment, which could not be recovered back.

Of these in their order—

I.

THE FACTS DISCLOSED IN THE FINDINGS DO NOT ENTITLE THE APPELLEE TO THE RELIEF PROVIDED FOR IN THE ACT OF JUNE 16, 1880.

By section 2 of the act of June 16, 1880 (21 Stats., 287), it is provided as follows:

> In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said lands, whenever such entry shall have been duly canceled by the Commmissioner of the General Land Office; and in all cases where parties have paid double minimum price for land which has *afterwards been found not to be within the limits of a railroad grant*, the excess of $1.25 per acre shall, in like manner, be repaid to the purchaser thereof, or to his heirs or assigns.

In the case of *Medbury* v. *United States* (173 U. S., 492) it was urged that the provisions of this act invested the Secretary of the Interior with exclusive jurisdiction over the relief therein mentioned, and that the Court of Claims was without jurisdiction over the provisions of that act, upon the ground that the right and remedy were created by the same legislative enactment; but this court denied the correctness of that contention and held that the Court of Claims had jurisdiction over the provisions of that statute, for the reason that it was a right founded upon a law of Congress within the meaning of that expression as used in the Tucker Act. The court, however, proceeded to construe this act of June 16, 1880, and dismissed the petition in the case for the reason that at the time the entry was made the land was situated within the limits of a railroad grant, and that it did not fall, therefore, within the provisions of this act, the case not being one where "double minimum price was paid for land which was afterwards found not to be within the limits of a railroad grant," albeit the railroad was not built and the grant was subsequently forfeited by an act of Congress. In this decision this court confirmed the construction placed upon that act by the Interior Department, and which has been uniformly administered by that Department, to wit, that in order to obtain the repayment mentioned in the last clause of section 2 of this act there must have been an error of fact existing at the time the entry was made—that is to say, at the time the entry was made it must have been supposed by the entryman and by the land officers that

the land entered was in fact within the limits of a grant to a railroad, when, as a matter of fact, as subsequently discovered, the land was not within the limits of any railroad grant at the time of its entry.

It seems to us that a bare inspection of this statute establishes the fact that it was designed to correct errors of fact only, and the injustice which might result therefrom in the absence of some provision authorizing the repayment of the money thus erroneously received upon facts mistakenly supposed to exist. The instances in which the money is authorized to be refunded may be thus specifically enumerated:

First. Where the entry has been permitted by the local land officer to be made erroneously and which has to be canceled because it is now found to be in conflict with a prior entry—that is, for the whole or a part of the same land taken under a prior entry.

Second. Where for any other cause the entry has been erroneously allowed and can not be confirmed, such, for example, as an entry erroneously allowed on land subsequently ascertained to be in the Indian domain, or on a military reservation, or in the withdrawn sections of a railroad grant, etc.

Third. Where the entryman erroneously paid the double minimum price for lands which at the date of entry were supposed to be within the limits of a railroad grant, but which are subsequently discovered not to have been within the limits of such grant at the date of the entry—such, for example, as unsurveyed or erroneously surveyed land where the line limit of

the grant was not correctly known, or where, prior to the entry, the grant had been changed, which change was overlooked by the local land officers, etc.

Manifestly the claim at bar can not fall under either the first or second of these provisions, because in such case the act provides that repayment can only be made when the entry shall have been canceled by the Commissioner of the General Land Office and a relinquishment thereof been made by the entryman, which in this case, of course, has not been done. It must, therefore, come within the third provision in order to be founded upon the statute at all; and manifestly it can not come within this clause of the statute for the very simple reason that the land is now, and always has been, within the limits of a railroad grant and is in no sense land for which double minimum price has been paid which has afterwards been found not to be within the limits of a railroad grant. It seems to us that the case of *Medbury* v. *United States* (173 U. S., 492, 499, 500) is conclusive upon this subject. That was a case in which the return of one-half of the purchase price was sought under the provisions of the act of June 16, 1880, upon the notion that where land, which, at the date of its purchase, was within the limits of a railroad grant, subsequently fell without such limits by reason of the fact that the grant was forfeited, came within the provisions of this act providing for repayment. But this court, speaking through Mr. Justice Peckham, said:

> The Secretary decided that the act does not apply to a case such as this where at the time

of the entry the lands were within the limits of a railroad grant, and so continued for eighteen years, and where it was only by the failure of the railroad company to build the road and the forfeiture of the land grant by the Government consequent upon such forfeiture that the land then ceased to be within such limits. Whatever may have been the reason of Congress in making the charge $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties suppose that the land entered was within the limits of a grant, and where subsequently it was discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the land which he thought he was obtaining by virtue of his entry, then the act of 1880 applies. Here no mistake whatever has been made. The lands were within the limits of a land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress. * * * Hence, when in subsequent years the company failed to build its railroad within the limits of the land grant at this point, and the same was forfeited, the Government was under no obligation whatever by virtue of the act of 1880 *or otherwise* to repay the difference in price for these lands.

And such has been the uniform construction placed upon this act by the Interior Department. (See *Texas*

Pacific Grant, 8 L. D., 530; *Jacob A. Gilford*, id. 583; *George G. Foster*, 12 L. D., 316; *Medbury*, 25 L. D., 308.) And it is well settled by the decisions of this court that the contemporaneous and uniform construction placed upon a statute by the Executive Department which is charged with its execution is entitled to the greatest respect, and will not be overturned by the courts unless it is clearly erroneous. (*United States* v. *Moore*, 95 U. S., 760–763; *United States* v. *Healy*, 160 U. S., 136–141.)

Conceding, therefore, that the land in question fell within the provisions of section 3 of the act of June 15, 1880 (1 Supp. Rev. Stats., 298; 23 Stats., 237), and that the appellee was improperly charged and erroneously paid double minimum price therefor, still there is nothing in the provisions of the act of June 16, 1880, which would justify the court below in rendering judgment in his favor for the return of the excess over single minimum price.

This brings us to the consideration of the second point, which is whether there is any provision of law in the original jurisdiction of the court which would justify the judgment.

II.

THE FACTS DISCLOSED IN THE FINDINGS ARE NOT SUFFICIENT TO ESTABLISH AN IMPLIED CONTRACT AGAINST THE GOVERNMENT WHICH IS ENFORCIBLE IN THE COURT OF CLAIMS BY AN ACTION *EX CONTRACTU*.

The Court of Claims is invested with jurisdiction over suits against the United States for—

> All claims founded upon the Constitution of the United States or any law of Congress, ex-

> cept for pensions, or upon any regulation of an executive department, or upon any contract expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort. (24 Stats., 505.)

It having been already shown that this claim has no foundation upon the law of Congress of June 16, 1880, it follows that jurisdiction to render the judgment must rest upon a cause of action set up in the petition which makes out an implied contract against the Government within the meaning of that expression as used in the above-cited act of jurisdiction. It is confidently submitted that the facts in the case at bar are not sufficient to create a contract "expressed or implied against the Government of the United States."

What is an implied contract? It is a contract—just as much of a contract as though it had been reduced to writing and signed by the parties with their names at the end thereof; and the only difference between an implied contract and an expressed one is in the method by which it is proved. In the one case the evidence to prove the contract is by the production of the written instrument, and in the other case by the introduction of such facts and circumstances as will induce a court to say that the parties intended to contract, although they did not reduce such intention to writing. An implied contract, therefore, is none the less a contract—and all the elements of a contract—privity, certainty, consideration, and mutuality of agreement—are necessary to its existence. The facts relied

upon to establish an implied contract must negative any other hypothesis than that of a mutual agreement between the parties, understood and acted upon by both, though expressed by neither. And unless the facts and circumstances of a given case are such that the court can declare with certainty the existence of this actual though unexpressed contract, it follows that the case is not one of implied contract, and if it be not an implied contract, it should not be called such nor treated as such, nor should the powers of a court of limited jurisdiction be extended beyond the scope of the jurisdictional statute in order to administer relief to a claimant, however deserving, upon the erroneous notion that a moral obligation can be enforced as if it were a contract.

The definition of an implied contract which we have given above will not be questioned. It is the universal and uncontradicted doctrine of the courts of the English-speaking world. An extended array of authorities on this point would be superfluous—an example or two will suffice.

In his work on contracts, Story says (Story on Contracts, 5th ed., sec. 11):

> Where the agreement is a matter of inference and deduction, it is called an implied contract. Both species of contracts, however, are equally founded on the actual agreement of the parties, and the only distinction between them is in regard to the method of proof, which belongs to the law of evidence. In an implied contract the law only supplies that

> which, although not stated, must be presumed to have been the agreement of the parties.

And so this court in the case of *Schillinger* v. *United States* (155 U. S., 163) dismissed a claim for the use of a patented invention because the invention was used by the agents of the United States in denial of the rights of the plaintiff, and inasmuch as at the time the invention was used there was no recognition on the part of the Government's agents of private ownership, there could not possibly arise any implied promise to pay for the use of the invention. The court said (at p. 167) "some element of contractual liability must lie at the foundation of every action;" and this contractual liability is fully defined on page 170, where the court say:

> There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement.

It is true that the court say that this was a tort on the part of the Government's officers; but the tort was the mere result of an absence of an agreement to pay, because of an absence of a recognition of private ownership; and it was this absence of all contractual relations which caused the dismissal of the case, and such dismissal would have followed whether the facts of the case were such (in the absence of contractual relations) as to make a tort or not, for the reason that the court would be without jurisdiction to render a judgment in the absence of a contract, express or implied.

So it is settled that where the United States takes possession of and uses property which at the time it asserts to be its own, and denies the ownership of the plaintiff—takes the same under a claim of right—no implied contract to pay for the value of the property thus taken arises which can be enforced against the United States in the Court of Claims, although it transpire in the proof that the claim of the United States was erroneous and that the property taken did in fact belong to the plaintiff. (*Langford* v. *United States*, 101 U. S., 341; *Hill* v. *United States*, 149 U. S., 592.) In the latter case the court said:

> An action in the nature of assumpsit for the use or occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser (citing cases).
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> In *Langford* v. *United States* (*supra*) it was accordingly adjudged that when an officer of the United States took and held possession of land of a private citizen under a claim that it belonged to the Government, the United States could not be charged upon an implied obligation to pay for its use and occupation. * * * The case at bar is governed by the Langford case. It was not alleged in this petition nor admitted in the plea that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building

thereon, and claimed damages of the United States for the use and occupation of the land for a light-house. The United States positively and precisely pleaded that the land was submerged under the waters of the Chesapeake Bay, one of the navigable waters of the United States, and that the United States under the law, for the purpose of a light-house, has a paramount right to its use as against the plaintiff or any other person, and the plaintiff demurred to this plea. The circuit court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.

[See, in accord, *Church* v. *Gas Co.*, 6 Ad. and El., 859; *O'Conner* v. *Hurley*, 147 Mass., 144, 148; *Day* v. *Caton*, 119 Mass., 513; *Holmes* v. *Board of Trade*, 81 Mo., 137; *Potter* v. *Carpenter*, 76 N. Y., 157; *Moyer's Appeal*, 112 Penn. State, 290; *Pew* v. *Gloucester Bank*, 130 Mass., 391, 396; *La.* v. *R. R.*, 27 La. Annual, 641; *Heffron* v. *Brown*, 155 Ill., 322; *Hertzog* v. *Hertzog*, 29 Penn. State, 465, 467, all of which are direct adjudications upon this issue and which enforce, under a wide variety of facts, the doctrines here laid down.]

Thus for work and labor performed, or for services rendered, or for money had and received, before an implied assumpsit or contract can be successfully urged, the facts must show that the services rendered, or the work and labor performed, or the material furnished, were furnished by one party and accepted by the other under such circumstances as will show that the party furnishing them expected at the time to be paid, and

that the party receiving them knew of this expectation, and so knowing received and accepted the benefits of the thing furnished. But the mere fact that something was furnished by one party and received by another will not justify an implied promise to pay for it. (*Holmes* v. *Board of Trade*, 81 Mo., 137; 1 Keener's Selections on Contracts, pp. 17, 18; *Jones* v. *Woodbury*, 11 B. Mon. (Ky.), 168, 172.)

In *O'Conner* v. *Hurley* (147 Mass., 144, 148) it was held that the fact that a house had been erected upon land supposed to belong to the mother, but in which the mother only owned a dower interest, will not raise an implied contract or promise on the part of the daughter, who owned the fee in the land, to pay for such house, although she knew of its being built, and although her property was thereby quadrupled in value.

So it is well settled that one under a salary or other contract pay who performs, without an express understanding as to compensation, duties in excess of what the contract of employment demands, will be presumed to have rendered it under the contract of employment, and no promise to pay for such extra service will be implied. (*Pew* v. *Gloucester Nat'l Bank*, 130 Mass., 391, 396; *Levisen* v. *R. R.*, 27 La. Annual, 641.) In the first of the above-cited cases the president of a national bank performed services for the bank outside or beyond the scope of his official duties, to wit, the preparation of plans for, and the superintendence ot the erection of, the bank building. In the

second case the same service was performed by a president of a railroad corporation in and about the construction of a depot. In both cases the corporations knew of the services, made no objection to it, and accepted the benefit of it and profited by said services, which, in both cases, it was admitted on all hands, were not services which were required by the contract of employment. No agreement, however, was had for extra compensation and no claim was made for the services at the time they were rendered, nor until the services had been completed, when actions were begun to recover the value of the services upon the theory that the law would imply a contract to pay for that which the corporations had accepted, used, and received the benefits of. The courts summarily disposed of both cases upon the ground that the corporations at the time they permitted the work to be done had no notice that any extra pay was expected for it; that the persons performing the services were bound, if they intended to claim extra pay, to so notify the corporations at the time, and that not having made any such claim at the time, the corporations had a right to presume that no extra pay would be demanded, and that the law would not imply a promise to pay for such services by one who had no notice that pay would be required at the time he accepted it; in other words, to use the expressive language of the chief justice of the Court of Claims in *Boston* v. *District of Columbia* (19 C. Cls. R., 31, 32): "It is a general principle that no man can be forced into a contract against his will."

Bearing in mind these thoroughly well-settled doctrines of the law of contract, let us inquire concerning the facts relied upon in this case to make out an implied contract to repay to the appellee one-half of the purchase money which he paid to the Government for the land in question.

On March 11, 1891, the appellee filed his declaratory statement under the preemption laws, declaring his intention to preempt the land in question. This declaration was to expire on March 2, 1892. On September 16, 1891, the appellee gave the public notice required under the law of his intention to make final proof at the land office at Ashland, Wis., on November 9, 1891, and upon that date satisfied the local register and receiver at Ashland, Wis., that he had complied with the requirements of the preemption laws. And thereafter, to wit, on the 11th of November, 1891, he paid to the receiver at Ashland, Wis., the sum of $400 for said land, which the register demanded as the lawful price of said land, and which the appellee, believing it to be the lawful price of the land, paid. The appellee did not make any protest or objection to the payment of the said sum of money, nor did he assert any right to purchase the land at any less price than that which he was called upon to pay. The receiver of public moneys at the Ashland office received this money from the claimant under a claim of legal right as being justly due and owing to the United States, and the appellee paid it in the belief that it was justly due and owing to the United States in compensation for the land which he had preempted. He not only did not assert any

right on his part to retain one-half of the $400 which he paid, and for which he now sues to recover, at the time the payment was made, but acquiesced in the claim of the appellant's agents that it was justly due and owing to the United States. How, then, can it possibly be said that at the time of this transaction there resided in the mind of either party the slightest thought of ever repaying one-half of this money, or ever demanding it back, or of ever receiving it back on the part of the appellee? How can it possibly be said that at the time this transaction was had there resided in the mind of either party any intention to contract or promise for the return of one-half of the money paid to the receiver by the entryman? Such a thing is an impossibility, because at the time the money was paid by the one party and received by the other there was no thought on the part of either but that the money was lawfully paid and lawfully received, and, therefore, of course, there could not have possibly resided in the mind of either any intention of repaying or expectation of receiving back one-half of it. It was not until long after the transaction had been consummated and completed and patent issued to the entryman for his land that any thought of receiving back one-half of the purchase money ever entered the mind of the appellee, and then probably upon the advice of his counsel that the sum had been erroneously charged. The money was demanded under a claim of right just as the patented invention was used in the Schillinger case under a claim of right, and just as private property was appropriated by

the Government in Hill's case, and in Langford's case under a claim of right; and, just as in those cases, it is entirely immaterial whether this claim of right subsequently turns out to have been unfounded, for it is sufficient that the property was taken under the belief or under the assertion that the Government had a right to use it, for in that case there is a complete negation of any notion of an implied contract to pay for its use or its value. Just as no contract could arise in those cases because the agent taking or using the same did so under a claim of right, which is necessarily the very antithesis to a promise to pay for the thing, so here there can exist no implied contract to refund money which was demanded and received under a claim of right, without any assertion on the one part or recognition on the other part of any private ownership therein, because such facts are the very antitheses of those which are necessary to make out a case of implied contract. We therefore submit that the facts in the case at bar are clearly within the principle of the decisions of this court in the Schillinger case, the Langford case, and the Hill case; and we further insist that it is entirely immaterial that in those cases the court found that the facts were not only sufficient to negative the notion of an implied contract, but were also sufficient to create a tort against the plaintiff. The creation of a tort by the evidence is only an additional reason for excluding the case from the jurisdiction of the court under the provisions of the Tucker Act, in prohibiting that court from assuming

jurisdiction over cases which sound in tort—the creation of a tort is merely cumulative. Whether the facts do or do not make out a case of tort, yet if they are such as to negative the inference or the construction or the implication of a promise to pay for the thing taken or used, or for the return of the thing appropriated at the time of the transaction, then all notion of an implied contract is necessarily at an end, and the Court of Claims is utterly without jurisdiction to found a judgment upon any such condition of facts—tort or no tort. If the Government "in equity and good conscience" should return this money to the appellee, then the Court of Claims can very safely emulate the example of this court in *Smoot's case* (15 Wall., 36–45), when it relegated the claim to the Congress for relief, saying:

> There arises in the minds of parties and counsel interested for the individual against the Government a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity coloring even the closest legal argument. These are addressed in vain to this court. Their proper theater is the halls of Congress, for that branch of the Government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be and to which the ordinary principles of contracts must and should apply.

III.

THE APPELLEE'S RIGHT TO CLAIM A RETURN OF THE MONEY IS AT BEST A MERE MORAL RIGHT. THE JURISDICTION OF THE COURT OF CLAIMS TO RENDER JUDGMENTS AGAINST THE UNITED STATES IS LIMITED TO CONTRACTS EXPRESS OR IMPLIED—REAL CONTRACTS. IT HAS NO POWER TO ENFORCE A MORAL OBLIGATION. THAT POWER RESTS EXCLUSIVELY WITH THE CONGRESS.

We are aware that, in courts of *unlimited* jurisdiction, moral obligations have been permitted to be enforced by contract remedy as obligations arising *ex lege*. But in cases of this sort it is necessary to constantly bear in mind the two fundamental reasons for such decisions. The first is that the courts administering the relief were courts of *unlimited* jurisdiction, and were not circumscribed by the provisions of statutory authority. The second is that the relief, if not administered by the courts, could not have been obtained by the plaintiff in any other form. Neither of these reasons exist in the Court of Claims, for, in the first place, the Court of Claims is not a court of *unlimited* jurisdiction, but is a court of limited and circumscribed jurisdiction, given power to render judgments against the sovereign government only in certain well defined and specified cases; and the Court of Claims, before it has any power to render judgments against the Government, must find its warrant for so doing in the plain language of the statute creative of its jurisdiction, which statute must be strictly construed, for the sovereign can not be sued except in such cases and before such tribunals as it has plainly authorized. And in the second place, the sufferer, if debarred from relief in

the courts, is not without any other remedy, for he has at all times his right of appeal to the Congress, which has plenary power to administer such abstract right and moral equity as it has withheld from the jurisdiction of the court or to refer the claim to the Court of Claims by special act, as is frequently done.

The only reason why an obligation of this sort was enforcible at common law by a contract remedy was because of the paucity of common-law action, there being only actions *ex contractu* and *ex delicto*. There was really no reason why the obligations should not have been enforced by an action *ex delicto*, and indeed it would seem to be a much more appropriate remedy than an action *ex contractu*, for the action is really one of damages for the perpetration of a wrong, and not in any sense an action to recover for a breach of contract. But although the remedy was given *ex contractu*, the remedy had no sort of relation to the right, and the enforcement of the obligation was not strictly *ex contractu*, but *quasi ex contractu*. It must always be borne in mind that the analogy between this right and a contractual right is an analogy of *remedy only*. The word "*quasi*" in this connection signifies "analogous to," and refers to the *remedy* and not to the *right*. A *quasi* contract *is not a contract at all*, but merely the imposition of a moral obligation enforcible by a contract remedy. (Maine on Ancient Law, 1 Amer. ed., pp. 332, 333; Auston's Juris., 3 Eng. ed., vol. 2, p. 1016 *et seq.*; *Wood* v. *Ayers*, 39 Mich., 345, 352, 353, 354; *Hertzog* v. *Hertzog*, 29 Penn. State, 465, 467;

Dusenbury v. *Spier*, 77 N. Y., 144; *O'Brien* v. *Young*, 95 N. Y., 426; *Milford* v. *Commonwealth*, 144 Mass., 64; Keener Quasi Contracts, chap. 1, *passim.*) But a statute which limits the jurisdiction of a court to "contracts express or implied" does not entitle a court to take cognizance of moral obligations, or obligations arising *ex lege*, and to enforce them as if they were genuine contracts. This is well shown in the decision in *Dusenbury* v. *Spier* (77 N. Y., 144), where the legality of an arrest turned upon the meaning to be given to the words "contract, express or implied," as used in the statute regulating arrests in civil actions. The plaintiff was arrested on a warrant issued on the theory that the action was one of contract, express or implied, within the meaning of those words as used in the statute. It was held that his liability was in *quasi* contract, or constructive contract, and that the phrase "contract, express or implied" was used in the statute with reference solely to genuine contracts. The arrest was therefore held illegal, and the judgment was reversed.

In the case of *Woods* v. *Ayers* (39 Mich., 345, 352, 353) the question arose in this wise: The defendant was sued by the plaintiff in an action for the recovery of money due for goods sold and delivered. The defendant pleaded as an offset to the demand of the plaintiff a liability of the plaintiff which accrued to the defendant under a statute of the State which provided in effect, that where any person obstructed a navigable river with logs or timber, they might be removed by

anyone desiring to use the stream; and the person who placed them in the stream should be "liable" to the person who removed them for all costs and expenses of such removal. But the set-off statute of Michigan confines the right of set-off to cases arising upon contracts, and the question was whether the plaintiff's liability to the defendant under this log statute could be regarded as arising upon a contract so as to enable the defendant to plead it as a set-off to the plaintiff's suit for goods sold and delivered. The court held that the liability was merely one which arose *ex lege;* that there was wholly wanting the consent of parties, the mutuality of agreement, the consideration, and every other element which goes to make up a contract; and that, therefore, the liability imposed by this statute could in no sense be regarded as a liability arising upon a contract, and was not, therefore, a proper subject of set-off under the Michigan statute relating to that subject.

The precise question in the case at bar was decided in the case of *Milford* v. *Commonwealth* (144 Mass., 64), where it was held that the jurisdiction given to a superior court by a statute "of all claims against the Commonwealth which are founded on contract for the payment of money" did not extend to an *obligation* imposed upon the Commonwealth by statute to reimburse the expense incurred by a town in support of a State pauper. In this case the court said:

> A contract may be expressly made, or a contract may be imposed or implied when it is found that there is an agreement of the parties and an intention to create a contract, although

that intention has not been expressed. In either case there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract and no agreement of the parties, but the law has imposed the obligation *as if* (*quasi*) it were an obligation arising *ex contractu*. In such a case there is *not* a contract, and the obligation merely arises *ex lege*. We are of opinion that the statute was not intended to give the superior court jurisdiction over obligations for the payment of money imposed by a statute upon the Commonwealth. There are many such obligations, but they are not within any of the definitions of a contract, all of which require a consent or agreement of the parties. *These statutory obligations must be performed by the officers of the Commonwealth or by the legislature.* * * * No judicial remedy against the Commonwealth has been provided, and the Commonwealth can not be sued in its own courts without clear statutory authority.

IV.

THE PAYMENT MADE BY THE APPELLEE, BEING MADE WITH A FULL KNOWLEDGE OF THE FACTS AND WITHOUT ANY MISTAKE OF FACTS, CAN NOT BE RECOVERED BACK, ALBEIT THE PARTY PAYING AND THE PARTY RECEIVING THE MONEY WERE BOTH MISTAKEN AS TO THE LAW.

The facts disclosed by the findings clearly establish a case of voluntary payment with a full knowledge and understanding of the facts by the appellee, and paid by the appellee because he thought he ought to pay. A payment of this sort can not be recovered back, notwithstanding the appellee's mistake of the law.

The findings disclose that the declaratory statement required by the preemption laws was filed by the appellee before the local land officers at Ashland, Wis., on the 11th of March, 1891, and that on November 11, 1891, he made the necessary proof and purchased the land at the rate of $2.50 per acre for the 160 acres thus preempted, paying therefor the sum of $400. In Finding I it is not specifically stated whether on the 11th of March, 1891, at the time the appellee filed his declaratory statement, he made any inquiry as to the price of the land. But this omission is corrected in Finding IV, where it is specifically found that he made no objection to the price of the land either at the time the entry was made (to wit, on the 11th of March, 1891) or at the time the money was paid (to wit, November 11, 1891). Finding IV is as follows:

> At the time said [cash] entry was made and said money paid to the receiver at the local land office at Ashland, Wisconsin, it does not appear that the claimant made any protest or objection to said payment, nor asserted any right to purchase the land at a less price than that which he was called upon to pay for said land.

We have, therefore, a man who comes before an officer of the local land office and files a declaratory statement of his intention to preempt a certain piece of land within the limits of a railroad grant. He is informed of the price of the land, makes no objection to the price, and does not assert any right to purchase the land at a less price. He goes away and makes the

improvements on the land which the preemption laws require and seven months later he returns to the local land office, and, after making due proof of his compliance with the requirements of the preemption laws, pays to the receiver of the land office the sum of $2.50 an acre, without any question as to the legality of the charge and without the assertion of any right on his part to purchase the land at a less price. There was no fraud; there was no oppression; there was no duress; there was no coercion on the part of the agent of the Government who received from the appellee the money thus paid. There was no mistake of facts on the part of the appellee; there was no concealment of any facts on the part of the agent of the United States; there was neither protest nor objection on the part of the appellee to the price charged for the land and by him willingly paid, nor was there an assertion of any right on his part to purchase the land for a less price. The whole case is one simply of an officer of the Government charging a certain price for land because he believed it to be the lawful price thereof, and of that price being paid by the entryman because he also believed it to be the lawful price thereof. It is a pure case of a mistake of law, and money paid under these circumstances can never be recovered back.

The right to recover back money paid to another who is not rightfully entitled thereto and who can not in equity and good conscience retain it, is a very exceptional one and is closely watched, and only arises out of two classes of transactions: First, where the party, although he pays it voluntarily and without

objection, does so under a mistake of fact; and, secondly, where, knowing the facts and suspecting the law, he makes protest and only pays under compulsion or duress, which the other party, by reason of his position, is able to exercise over either the person or the property of the payor.

The two classes are perfectly distinct, and a given transaction must belong to one or the other, and once being located, only confusion of thought results from an attempt to examine into the existence of those elements which are material to those of the other class only. The claim in the case at bar falls wholly within the first class, namely, that of a payment made with a full knowledge of the facts and without any thought or knowledge of any unlawfulness of the demand. As a result, it is entirely immaterial that he did not protest, and also immaterial whether the party receiving the money was in a position to coerce. Protest and coercion are both impossible conditions of a payment voluntarily made by one who *believes he ought to make it.* Conceding, then, that $1.25 per acre was the lawful price of this land, and that the claimant, believing such price to be lawfully the sum of $2.50 per acre, under the law, paid that sum by reason of such erroneous belief, yet he wholly fails to show a case for recovery back. It is not enough that the receiver ought not in equity and good conscience to retain the money; that condition is merely cumulative of the other one, that the money must have been paid by reason of a mistake of fact, and the latter is just as essential a matter as the former. For example, in the case

of *Corkle* v. *Maxwell* (3 Blatchf., 413), it was held that a person who has his private warehouse designated by the Secretary of the Treasury as a place for the storage of dutiable merchandise, under an act of Congress, and who, on being *required* by the Government, before the depositing of any goods in his warehouse, elected to pay the collector either the salary of an inspector or one-half of the accrued storage at public storage rates, elects the former and makes payment thereunder, which is paid into the Treasury, can not recover it back, *although the Government had no legal right to demand* the payment, for, just as in the case at bar, the party paying and the party receiving both believed at the time that the payments were lawfully demanded and lawfully payable.

In *Knibbs* v. *Hall* (1 Esp. N. P. Cas., 83) a tenant was not permitted to recover back from his landlord, or to be allowed by way of set-off, a sum of money which he had paid beyond the rent actually due from him on the supposition that he must otherwise suffer distress. To the same effect is *Brown* v. *Kinnally* (1 Esp. N. P. Cas., 279) and *Marriott* v. *Hampton* (2 Esp. N. P. Cas., 547).

In the case of *Bilbie* v. *Lumley* (2 East., 469) Lord Ellenborough said he never heard of a case in which a party who had paid money to another voluntarily with a full knowledge of the facts of the case had been permitted to recover it back on account of his ignorance of the law.

In the case of *Brisbrain* v. *Dacres* (5 Taunt., 144) this subject was elaborately considered by the court

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and the principles of *Bilbie* v. *Lumley* (*supra*) were recognized and upheld. Brisbrain, who was the captain of a frigate belonging to a squadron under the command of Admiral Dacres, received from the Government £850 for freight of certain public moneys, and from the Bank of England upward of £7,000 for freight of money of individuals. He paid over to the admiral one-third of the sums thus received, under the belief that he was legally entitled to it; but on discovering that he was not, he brought his action to recover it back. It was shown to be the usage in the navy for a captain of a vessel carrying public and private freight to pay one-third of the freight of the same to the commander of the squadron to which he belonged, though it was admitted that the admiral had no legal claim to any portion of the allowance. But the court held that the money, having been paid with a full knowledge of the facts and circumstances of the case, could not be recovered back because it had been paid under a misapprehension of the law. Mr. Justice Gibbs says that:

> Where a man demands money from another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he can never recover back the sum he has so voluntarily paid. He who receives it has a right to consider it as his without dispute, and it would be most mischievous and unjust if he who had acquiesced in the right by such voluntary payment should be at liberty at any time to rip the matter up and recover back the money.

The proposition that where money is paid under a mistake which there was no ground to claim in conscience the party may recover it back in an action of assumpsit is applicable only to mistakes of facts, and has no sort of application to a mistake of law; otherwise there would be no distinction between mistakes of fact and mistakes of law. A person who has paid money under a mistake of fact can not recover it back unless he is equitably entitled to it. The inquiry in every case, therefore, would be, not whether the money was paid under a misapprehension of the law or in ignorance of fact, for this would be immaterial, but whether the person to whom it was paid can in equity and good conscience retain it. If he can not, if there was any mistake of any character, he shall refund, for such a doctrine necessarily destroys all distinction between mistakes of law and mistakes of facts.

If this be so, why has the question been so frequently and elaborately discussed in the English and American courts, and not only in courts of law, but in courts of equity? How are the cases of *Bilbie* v. *Lumley* and *Brisbrain* v. *Dacres*, and hundreds of cases like them, to be reconciled to this principle? The doctrine is applicable to a mistake of fact, but is utterly inapplicable to a mistake of law. The distinction between mistakes of law and mistakes of fact is too well known to require argument. (2 Pom. Eq. Juris., 2 ed., sec. 840, 841.) The principle upon which courts refuse to relieve against mistakes of law is that in the judgment of the law there is no mistake, every man being held,

for the wisest reasons, to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it. This principle steers entirely clear of conscience or the equity of a transaction. The policy of the law and the necessities of civilized society do not require that a man shall not be relieved against a mistake in fact, and hence if one pays money to another in mistake of fact and the other in equity and good conscience is not entitled to it, the payor may recover it back. But the policy of the law and the necessities of civilized society do require that a man shall know the law and that he shall not be eternally opening consummated transactions because of an alleged want of knowledge of the law. "Courts do not undertake," says Chancellor Kent, in *Lyon* v. *Richmond* (2 John. Chg., 51), "to relieve parties from their acts and deeds, fairly done, on a full knowledge of the facts, though under a mistake of law. Every man is charged at his peril with a knowledge of the law; there is no other principle which is safe or applicable in the common intercourse of mankind."

The doctrines of these leading cases have been fully adopted by this court in a great variety of cases.

Elliott v. *Swartout*, 10 Pet., 137, 152.
Bend v. *Hoyt*, 13 ib., 262.
Morris v. *Traver*, 1 Dal., 147.
Little v. *Bowers*, 134 U. S., 547.
Waples v. *United States*, 110 U. S., 630, 632.
Barney v. *Ricard*, 157 U. S., 352, 358.

In the case *Waples* v. *United States* (*supra*) is presented about the strongest case that can possibly arise

where the contention could be made that one should return money paid by another when in equity and good conscience he has no right to retain it. In this case there was a sale of certain lands under confiscation acts of Congress. It subsequently developed that the alleged offender was not the owner of the land, and in an action of ejectment brought for that purpose the purchaser from the Government lost his land and a considerable sum as mesne profits. Thereupon the purchaser from the Government brought suit in the Court of Claims for money had and received, alleging, with the best possible show of reason, that the Government had given nothing in return for the money paid to it, and that in equity and good conscience the amount so paid should be refunded. But this court was resolute and held that the purchaser was bound to know the law, and that a payment made in ignorance thereof could not be recovered back, albeit the recipient had given no consideration for it. This case thoroughly establishes the proposition that the notion that money paid under a mistake can be recovered back if the recipient is not in equity and good conscience entitled to keep it is applicable only to money paid under a mistake of fact, and has no sort of application to money paid under a mistake of law.

To this head may be referred the recent decision of this court in *United States* v. *Wilson* (168 U. S., 273, 276), where it was held that where a consul in his regular accounts and statements with the Treasury charges himself with fees received by himself as consul and

pays the same into the Treasury and upon retirement makes his settlement upon that basis, he can not afterwards recover back such payments by suit in the court of claims, even though entitled to the money, as such payment will be regarded as voluntary and hence non-recoverable. In that case the court said:

> There is no pretense that he paid the fees into the Treasury to avoid a controversy with any department of the Government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so find in substance. If a voluntary payment can be made to the Government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the Government, we think that the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as a disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the Government without claim of any right to retain one penny of it.

Every word of this quotation is applicable to the case at bar, and must conclude the matter here. As was said in this case, so in the case at bar, "the facts show nothing but a voluntary payment of money to the Government without claim of any right to retain one

penny of it." A clearer case of voluntary payment could not be made out.

In addition to the leading cases already cited, the following cases may be referred to out of the great mass of cases on the subject of voluntary payments, because they are direct adjudications upon that issue, and illustrate the doctrines laid down in the text of the brief:

Clark v. *Dutcher*, 9 Cow. (N. Y.) (where the English and American authorities are elaborately reviewed).

Benson v. *Monroe*, 7 Cush (Mass.), 125.

Edge v. *Koontz*, 8 Pa. St., 109.

Bailey v. *Paulina*, 69 Iowa, 463.

Thompson v. *Daty*, 72 Ind., 336.

Regan v. *Baldwin*, 126 Mass., 485.

Ins. Co. v. *Stewart*, 95 Ind., 586.

Hipp v. *Crenshaw*, 64 Iowa, 404.

Hare v. *United States*, 9 Ct. Clms., 270.

R. R. v. *Thomas*, 85 Ill., 464.

Comstock v. *Tupper*, 50 Vt., 596.

Milnes v. *Duncan*, 6 Barn. & Cres., 671.

R. R. v. *Commissioners*, 93 U. S., 541, 543.

Phila. v. *Collector*, 5 Wall., 720, 731, 732, Div. 5.

Collector v. *Hubbard*, 12 Wall., 1–13, Div. 6.

As we said at the outset, the rules governing the second class of cases can have no sort of application here. The fact, if it be a fact, that the parties did not stand upon equal terms is wholly immaterial, because this class of cases involves as essential characteristics knowledge of his rights by the payor, and resistance,

or at least a reluctance to pay on his part, accompanied by insistence upon the part of the receiver clothed with some power of compulsion (*Maxwell* v. *Griswold*, 10 Howard, 242, 246). In the case at bar there was no reluctance or knowledge of suspicion of his rights under the law, and therefore it is utterly immaterial whether the receiver had the power to coerce, since that power did not in any wise bring about the payment.

The case of *Bailey* v. *Paulina* (69 Iowa, 463) presents an illustration. There the plaintiff was found guilty of a breach of a city ordinance. Believing the ordinance and conviction to be valid, he paid his fine while under actual arrest. Upon the ordinance being declared invalid he sued to recover back the fine. Notwithstanding all the opportunity of coercion, the court held that he could not recover, for the reason that the payment was caused, not by coercion or opportunity of coercion, but by the plaintiff's mistake of the law.

And so it is likewise entirely immaterial that the appellee here was dealing with a Government official. That makes no difference. If the payor believed that he ought to pay, and the payment was made for that reason and not because of coercion, this court has repeatedly held, notably in tariff cases, that such fact is utterly immaterial if, as in this case, the claimant paid without objection. (See *United States* v. *Wilson*, 167 U. S., 273, 276, quoted above.)

The case of *Elliott* v. *Swartout* (*supra*) is an illustration. There the importer paid duties supposed at the time, both by himself and the collector, to be lawful,

so that no objection or reluctance characterized the transaction on the one hand nor insistence or coercion on the other, although, of course, the collector, being in possession of the payor's goods, had plenary power to coerce. The court, utterly ignoring the lack of equality in the respective parties and the official character of the collector, applied exactly the same rules of law applicable to a payment between private individuals under a mistake of law, as we have stated above.

The law on this subject may be fairly, fully, and honestly summarized as follows:

(1) Money voluntarily paid with a full knowledge of all the facts can not be recovered, although paid under a construction of the law which subsequently turns out to be erroneous.

(2) All payments are voluntary where the party paying believes he ought to pay.

(3) All payments are voluntary when there is no duress operating upon the one nor fraud nor oppression practiced by the other, although the party paying believes he ought not to pay.

(4) If fraud, duress, or oppression be pleaded, it must be shown to be fraud, duress, or oppression from which the person making the payment has no immediate means of relief except by paying.

(5) If any other means of relief is at hand, as, for example, the litigation of the question in the courts, such means of relief must be resorted to, and if not resorted to, the plea of fraud, duress, or oppression will not avail.

In every aspect of this case, therefore, it is submitted that the judgment of the Court of Claims is clearly erroneous, and that the same should be reversed with instructions to dismiss the petition.

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